IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

GENERAL DYNAMICS :

LAND SYSTEMS, INC., :

Petitioner :

v. : No. 02-1080

DENNIS CLINE, ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, November 12, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

DONALD B. VERRILLI, ESQ., Washington, D.C.; on behalf of the Petitioner.

MARK W. BIGGERMAN, ESQ., Cleveland, Ohio; on behalf of the Respondents.

PAUL D. CLEMENT, ESQ., Assistant Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-1080, the General Dynamics Land Systems, Inc. v. Dennis Cline.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI

ON BEHALF OF THE PETITIONER

MR. VERRILLI: Mr. Chief Justice, and may it please the Court:

The very essence of age discrimination is the disparate treatment of older workers based on the false assumption that productivity and competence decline with old age. The Age Discrimination in Employment Act protects workers 40 and older from that kind of disparate treatment. It should not be stretched to cover claims by workers 40 and older that they have been treated disparately on the basis of their comparative youth.

QUESTION: Well, Mr. Verrilli, it - perhaps you can say that the language in the statute, because of an individual age - individual's age - is somehow ambiguous. But to what extent do we have to give some deference to the agency position on the thing? Because the Government is here taking a position contrary to yours based on agency interpretation.

MR. VERRILLI: They - they are, Justice O'Connor. That interpretation deserves no deference for three reasons, which I'd like to summarize and then first elaborate on. The first is that, under Chevron, the question - the question of deference is not dependent on whether there's a definitional ambiguity in the - in the specific operative language, in this case of Section 623(a), but on what the - what that language means as read in the context of the Act. And Chevron says, using all of the traditional tools of statutory construction, and applying that test we submit, as - as I hope to elaborate this morning, one cannot come to the conclusion that there - there - that this statute can be fairly read to authorize the kinds of youth discrimination claims that are at issue here.

The second reason, however, is that even if there were - even if there were ambiguity in general, which we submit there is not, under the holding, the express holding in Mead, the - the EEOC's regulation here is not entitled to Chevron deference, and the reason for it is this, and this is at page 227 of the Mead opinion in 533 U.S. The very sentence that states the holding in Mead says, a regulation is entitled to Chevron deference if it is - if it is promulgated in the - if the agency has been given by Congress the authority to promulgate rules

with the force of law, and we acknowledge that is true here.

But the second half of the test - this is in the statement of the holding in Mead - is that the rule has to be promulgated in an exercise of that authority, and the regulation that the EEOC is here defending today was not a - a rule that was given the force of law by the agency. In fact, the agency made - the Department of Labor, when it initially promulgated this regulation, made a deliberate decision not to promulgate it as a rule with the force of law, but instead to promulgate it solely as guidance to the public about its - about its enforcement authority and it was -

QUESTION: How - how do we know that?

MR. VERRILLI: Because that is what the Department of Labor said in the Federal Register when it promulgated this.

QUESTION: What - what - what did it say specifically?

MR. VERRILLI: It said, we are promulgating this as a matter of enforcement guidelines for the - guidance - so the public knows how we intend to enforce the - the - the statute. It did not promulgate a rule of law. And then when it was re-promulgated by the EEOC in 1981 - and again, the cites for this are on page 17 of our reply

brief - when it was re-promulgated by the EEOC in 1981, the EEOC made a deliberate choice, which it explained in the Federal Register, not to have this be a substantive rule with the force of law, and in fact it did not comply with, and stated it was not going to comply with, the 30-day notice period that is required for substantive rules of law so that -

QUESTION: Well, if we could call this an enforcement position or an enforcement policy on the part of the agency, and you're going to probably say we can't - shouldn't call it that - but if we could, doesn't the Government get some deference? You say it gets no deference at all?

MR. VERRILLI: If - well, it would get Skidmore deference, Justice Kennedy, and I think Christensen specifically says that, that it gets Skidmore deference if it's an enforcement guideline and not - and not a - a rule of law - substantive rule of law. But here, Skidmore - applying Skidmore, no deference is due to this regulation principally because it is a regulation that the - that has not been enforced in anything like a consistent manner. To the contrary -

QUESTION: That - that's a different issue, but let's - let's come back to the point of whether it is promulgated as an interpretive regulation or a substantive

regulation. You are taking the position that only substantive regulations are entitled to Chevron deference?

MR. VERRILLI: The - the holding in Mead, Justice Scalia -

QUESTION: Only - only - only substantive regulations? Mead does not say that.

MR. VERRILLI: The - the holding in - the sentence that's in Mead that says -

QUESTION: All of the regulations of the SEC, for example, virtually all of them are interpretive regulations.

MR. VERRILLI: The question under Mead is whether it was a regulation that was promulgated that - that has the force of law, and they -

QUESTION: No, but your - your - point is -

QUESTION: That does not equate with interpretive.

MR. VERRILLI: Not necessarily. But here they made a deliberate decision that it wasn't going to have the force of law and they, for example, in 1981 -

QUESTION: No, they didn't. They - they promulgated it, on page 17 of your brief, as an interpretation rather than a substantive regulation, and that's what it is.

MR. VERRILLI: Right, right, Justice Scalia. But

they did not comply with the 30-day notice period, which is required -

QUESTION: You don't have to for - for interpretive regulations.

MR. VERRILLI: But for rules with the force of law you do.

QUESTION: For substantive regulations you have to. You do not have to for interpretive regulations, but that does not mean that an interpretive regulation does not - is not entitled to Chevron deference and is not fully as - as effective as - as laying down the rule of law as a substantive regulation. That's never been the - the rule.

MR. VERRILLI: The question here is whether the agency intended this to be a rule of law or - or guidance of its own enforcement authority, and it - and it clearly intended the latter and it has acted in a manner consistent with the fact that it's the latter and not the former, because it routinely refuses to enforce the principle that the Government is here advocating today. Indeed, in every single instance in which this issue has come before the Department of Labor and the Equal Opportunity - and the EEOC - since the mid-1970's, in every single instance the - the Department of Labor or the EEOC has blessed a - an employment practice that provides

comparatively older workers with a benefit not available to workers - to all workers 40 and older so -

QUESTION: Mr. - Mr. Verrilli, I - I will assume you're - you're right on the - the application of Mead here, so far as the reg goes. What about the - I think it was the 1997 adjudication?

MR. VERRILLI: The 1997 adjudication, it seems to me, is not something that can give rise to Chevron deference, because that - they were just acting pursuant to their own view of what the - of - of what their - what the statute -

QUESTION: Wasn't it binding - wasn't it binding on the parties before them?

MR. VERRILLI: It was binding on the parties, Justice Souter, but, of course, even if - if the Court were to conclude that under Mead you get Chevron deference, and I don't think you can for that reason, you still have the problem, in our view, which is the more fundamental problem, which I'd like to address, which is that -

QUESTION: Before you leave me, can I just read you two sentences from Mead? First sentence says, it is fair to assume generally that Congress - that Congress contemplates administrative action with the effect of the law when it provides for a relatively formal

administrative procedure, which you say doesn't exist here. Next sentence, that said, and as significant as notice and comment is in pointing to Chevron authority, the want of that procedure here does not decide the case for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.

So, as I read that last sentence, I certainly thought that if Congress so intends, we should give Chevron deference to a rule that has not complied even with notice and comment.

MR. VERRILLI: Yes -

QUESTION: So I couldn't read Mead as saying you have to have that or you don't get the deference.

MR. VERRILLI: But I think the fundamental point for us under Mead, and then I'd like to move back to the main - the Chevron analysis, if I could, but the fundamental point for us under Mead, Justice Breyer, is that the agency made a deliberate decision here not to have this rule be one that was a binding rule -

QUESTION: Well, I - I don't know how often an agency says what this agency said here, that we are promulgating this as an indication of how we intend to enforce the law. And you're saying there is a chasm between rules that are issued with that kind of a

statement and rules that are issued otherwise. The agency says, in one case, this is the law, and in the other case, this is how we interpret the law. I - I don't see that that makes the difference.

MR. VERRILLI: I don't see how the agency could, Justice Scalia, think that this had the force of law, because they didn't follow it themselves in the manifold in this decision of which the issue -

QUESTION: Well, that's - that's a different point. That's a different point.

QUESTION: Well, isn't - isn't that your - isn't that your stronger point that - that combined with the - the relatively abbreviated procedure, they have, in fact, in a number of instances not followed it and they have never affirmatively, as - as a - as an administrative movement, they have never affirmatively enforced it. Isn't - isn't -

MR. VERRILLI: That's - that's all correct and we - I think that does summarize our point more strongly.

QUESTION: Which I think goes to the Chevron point.

MR. VERRILLI: Going - I agree with that, Justice Souter - but going back to the main question of whether you even get to ambiguity under Chevron, we submit that the answer to that question is no, because Section 623(a)

is not to be read in isolation. The fundamental principle of statutory construction is that it needs to be read in context, and the relative contextual indicators here, we submit, foreclose the argument that Congress intended in the ADEA to authorize the kind of youth discrimination claims that are at issue here.

QUESTION: Why, Mr. Verrilli, when we have - what is it - 623(f)(2)(B) - that makes an express provision for older worker versus younger worker. If that were the general interpretation of the statute, then this specific provision relating to an older worker vis-a-vis a younger worker would be unnecessary.

MR. VERRILLI: I respectfully disagree with that, Justice Ginsburg, and - and - I'm - I'm looking now at page 3a of the statutory appendix to the Government's brief where the - where provision is located. (B)(i) is in the statute, as the preamble to the Older Worker Benefit Protection Act states, to - to provide employers with an affirmative defense to a charge that they have discriminated against comparatively older workers by providing them benefits at a lower level than comparatively younger workers.

And what - what (B)(i) says, which I take it is the provision Your Honor is referring to, is that, in that situation, even though the comparatively older worker is

being disfavored, the comparatively older worker has an affirmative defense, if the older worker can - if the employer can show that the - that it spent as least as much on the benefit for the older worker as it did for the younger worker, even if the benefit is less, and so that -

QUESTION: Well, does that provision cover your situation, do you think, here?

MR. VERRILLI: We - we -

QUESTION: I mean, could you fit yourself, your client's situation, under that provision?

MR. VERRILLI: Yes, Justice O'Connor. We can shoehorn ourselves into that provision.

QUESTION: And why - is that still pending in the court below, that argument?

MR. VERRILLI: It is - it is still pending in the court below. That's correct, Your Honor.

QUESTION: So, no matter what we do, you would take the position that that provision will cover this case?

MR. VERRILLI: We do think so, Your Honor. Of course, the respondents won't agree with that, I'm quite sure, and I - and I don't think that that's going to solve the many problems that the Sixth Circuit's decision gave rise to here. For example -

QUESTION: Well, that - that's my next point. The - the briefs try to tell us that there's going to be cataclysmic consequences if we don't rule your way. This safe harbor provision gives very substantial protection against that, does it not, or - or does it?

MR. VERRILLI: Yeah - let - if I - I think it gives some protection, not complete protection, but I think there are a whole range of other negative consequences, Your Honor, that I'd like to address, if I could, and then - and I will certainly directly address the safe harbor provision.

First, there are a number of employment practices out there where the nation's major employers have engaged in efforts to retain older segments of the workforce and to bring back elderly citizens back into the workforce by doing such things as providing for workers over a certain threshold age, very often 55, the ability to work part-time rather than full-time, to have flex-time schedules, to have - to have jobs that don't involve travel. They've changed the terms, conditions, and privileges of employment for people over a certain age to keep them in the workforce.

The safe harbor here applies only to benefits, Justice Kennedy, and therefore, would not protect that kind of behavior, and although the United States talks

about the safe harbor with respect to benefits, I would point out the brief of the United States is notably silent on the question of whether the interpretation being advocated here would make illegal that kind of conduct. And we submit it would because it clearly prefers the comparatively older to the comparatively younger with respect to terms, conditions, and privileges of employment, so -

QUESTION: Has the EEOC taken an enforcement position with reference to some of the practices you've just -

MR. VERRILLI: Yeah.

QUESTION: - or - or non-enforcement positions?

MR. VERRILLI: Yes, yes, they have. There are DOL and EEOC letters which approve those practices, but it's hard to see how one could possibly approve those practices consistent with an interpretation of Section 623(a) that imposed a rigid rule of equality for everyone 40 and over.

QUESTION: One of the amicus briefs pointed to a number of Internal Revenue Code provisions and ERISA provisions that appear to be implicated if you go with the Sixth Circuit view here, and perhaps would be in opposition to the interpretation, given the language -

MR. VERRILLI: Yes -

QUESTION: - by the Sixth Circuit. Now, have you commented on those various provisions?

MR. VERRILLI: We have, Justice O'Connor, and this is actually the second category of adverse effect, it seems to me, that you have if the - if this decision stands and if the rule of law is what the - what the Government advocates. Many of those provisions, which are detailed quite effectively in the ERISA Committee brief, provide for - for things such as employees with - employee stock option plans, ESOP plans, are allowed, once they become 55 years old, to diversify their stock holdings. Employees, when they retire at 59-1/2 can withdraw money from their retirement plans without facing the tax penalty. There are a host of provisions like that.

One point to be made is that it seems to me irreconcilable with the existence of those provisions to interpret 623(a) this way, but the other point my - my friends the respondents say, yeah, but you don't have to worry about that because the rule that the later-enacted statute governs over the former-enacted statute will take care of it. I'm afraid that's not so for the following reason. All of the examples I just gave, and many others in the - in the ERISA Committee brief, were statutes that Congress enacted before 1990, and I submit that 1990 is the relevant date for the later-enacted statute, because

it has - has - that's the - the Older Worker Benefit Protection Act was passed after Betts and it was passed in 1990, and it was that statute that made the ADEA applicable for the first time to fringe benefits of the kind that those regulations govern.

So you have a serious problem, at a very minimum, with respect to all of those regulations, it seems to me -

QUESTION: Mr. Verrilli, what do you do with Section 623(e), which prohibits any advertising by an employer indicating any preference, limitation, specification, or discrimination based on age? Now, age there could not possibly mean what you say it means in 623(a), that is, old age, because then it would just prohibit preferring older people. So what do you say it means then?

MR. VERRILLI: Well, I say -

QUESTION: It means young -

MR. VERRILLI: I - I -

QUESTION: In (a) it means old age and in (e) it means young age?

MR. VERRILLI: I have a lot to say about it, Justice Scalia. The first thing is this: The critique that the Government levels at us with respect to that provision is equally applicable to their interpretation.

What they say is that, you know, if it were lawful under the statute to grant a preference for old age - it doesn't make any sense to say that's it not lawful to advertise for old age - of course, what - if - if age means chronological age here, then you wouldn't be able to state a preference for chronological age in an advertisement, even though it would be perfectly lawful substantively to have a policy that said you're going to open positions to only people 40 or older.

So I don't think they get any mileage out of that - out of that, because I think they've got the same kind of linguistic difficulty that we have here with respect to it. And I think what that shows, Justice Scalia, is -

QUESTION: No, but it - it still has some meaning and some beneficial effect with their interpretation, whereas with your interpretation of age, it has no conceivable beneficial effect. You have to read it there as meaning young age and you read it in (a) as meaning old age.

MR. VERRILLI: Well, I think you could read it as meaning old age, but I think the truth of the matter is that the word age is something of a chameleon. It's a word that is very sensitive to context and it's going to have somewhat different connotations throughout this

statute, and I think it's quite clear that it does. It's a different connotation, for example, in Section B of the statement of findings and purposes, where it's quite clear that Congress is not talking about chronological age. It has a different connotation in the seniority provision, which you can find at page 3a of the Government's statutory appendix, which talks about involuntary retirement, down near the bottom of the page, that an employer's plan cannot require the involuntary retirement of any individual specified by subsection 631 of this title because of the age of such individual.

Now, in a sense, that means chronological age, but not in the sense that my friends on the other side about 623(a), because what it means really is once you've become old enough that you've bumped up against the age limit, and there are other provisions in 623 in which age functions in exactly that way. I just don't think - I think this really is a case like Robinson against Shell Oil, where the word employee takes on different connotations in different sections, like - like Scheidler, where the word enterprise in the various subsections of RICO takes on different connotations depending on exactly how it's being used. I think the word age here takes on different connotations in different sections in the statute.

QUESTION: You must have thought of this and tried it out. It doesn't work, but as I was reading it I thought perhaps individual might refer to older individual.

MR. VERRILLI: Well, I think - I -

QUESTION: If - I mean, but that must not, but I'm sure - why didn't it work? Because if the - if you - if you have - if you read individual throughout - cite (1)(a)(i) is older individual. The only place it has bite is where you get to the end, because of such older individuals -

MR. VERRILLI: I think - we've thought about it in this sense, Justice Breyer, and I think it dovetails what I - what I think is our key contextual point, which is that statute only protects people 40 and older, and if what Congress was concerned about was a rule that precluded arbitrary discrimination in favor of the comparatively old as well as the comparatively young, it's an exceedingly strange thing to do to draw a line at age 40, because, of course, people under 40 are much more likely to be subject to discrimination on the ground that they're comparatively too young than are people over 40.

QUESTION: I - I thought it was a big deal when you had your 40th birthday, I mean -

(Laughter.)

MR. VERRILLI: Not anymore, Your Honor.

(Laughter.)

QUESTION: But is it -

MR. VERRILLI: But in any -

QUESTION: - isn't the - isn't the answer to - to the - to the argument that you've just made is that as - as a general proposition, anything that in effect interrupts or skews employment for somebody over the age of 40 is very difficult for somebody over the age of 40 to deal with, regardless of which way the discrimination is working? That is not as a general rule true of younger people, and that's why it would make sense for - for the - for the interpretation that - that was being suggested, to draw the line at 40.

MR. VERRILLI: I - I think - I think that's the - the best statement of the argument on the other side and I think it's the Government's effort to defend the line on that basis, but I don't think it works, because the reason that people 40 and over have a problem once they suffer an adverse employment action - and the Government itself acknowledges this in its argument - is because they are then subject to discrimination on the ground that they perceive - they are perceived as being too old. That's the problem, and that's the only problem the Government has been able to identify that people 40 and over suffer

is that kind of -

QUESTION: Well, the 41-year-olds are perceived as being too old in relation to people less than 41, and it still means that when somebody looks at a 41-year-old, they - the 41-year-old is just not as attractive an employee as somebody, you know, a year - a year younger or two years younger.

MR. VERRILLI: Yes, Justice Souter. I think that's true, but - but 623(a) isn't an all-purpose prohibition of arbitrary employment decisions respecting people 40 and over, and after all, that same kind of critique could be made of - if an employee is fired because they're not fit enough or they have the wrong color hair or -

QUESTION: Mr. Verrilli, it does - what Justice Souter suggested does fit with the comment of Senator Yarborough that was put out, that said that the 42-year-old would have a claim if the 52-year-old were preferred, say, for hiring or promotion.

MR. VERRILLI: It - it does. That's the only thing in the voluminous history of this - of this enactment and all of its amendments that provides any support for the Government's view here in response, but it - and it - but it does provide some support for that, I agree. But I really think -

QUESTION: The - the part of your explanation about the - the diminished hurt to the 40-year-old was within the - was within the universe of society as a whole, but within the context of his own or her own company, this is hurtful. These are people at that age who have younger children being educated and so forth, and if they find discrimination within their company, it doesn't help much for you to say, well, society as a whole doesn't discriminate against.

MR. VERRILLI: I think - I think, Justice Kennedy, that it's - it's important to go back to the source for this statute to understand what Congress was trying to do, the circumstances of enactment of this statute. After all, Congress could have, either in 1964, when it passed Title VII, or in 1967, when it enacted this statute, simply have put the word age into Title VII and had it operate in exactly the same manner Title VII does. But it made a deliberate choice not to do that.

The reason it did, I submit, is because the recommendations of the Secretary of Labor in response to the directive of Congress were that the problem of age discrimination in the workplace is fundamentally different than the problem of - than the problems that were addressed by Title VII. And the critical difference is this, that the - the kinds of discrimination that Title

VII addressed was discrimination on the basis of characteristics that are always irrelevant to a decision about who should be hired, fired, or promoted, or demoted. And what the Secretary of Labor said is that age is different, the age is not only irrelevant, age distinctions are not always arbitrary, and I submit the Court - the opinion for the Court in Betts identified exactly that principle, that this is a different kind of problem warranting a different kind of solution.

The problem was that there are stereotypes that exist that - that - on which employers act that - that prospective employees are - don't have the competence or the productivity to handle a job because they are too old, and that was the problem that this statute tried to address and it's why it tried to address it in such a fundamentally different manner than Title VII. Context makes all the difference here. Again, and - and I think the Court really did recognize that in Betts. Justice Kennedy, in Betts, you had the operative language privileges - terms, conditions, and privileges of employment, identical in Title VII to - and the ADEA.

But what the Court concluded in Betts was that that language had a different meaning. In Title VII it included fringe benefits. In the ADEA it did not include fringe benefits, and the reason for that was because

reading the provision not in isolation, but in the context of the rest of the statute, it was quite clear that Title - that the ADEA was meant to address a different kind of problem, and that there was age-based decision-making that was appropriate and not invidious and that ought not to be prohibited by law. And I submit that the kind of age-based decision-making that's at issue in this case is precisely the kind of age-based decision-making that Congress did not want to make unlawful.

And the reason for this is quite - is quite simply that people at the end of their working lives are in a different position, especially with respect to retirement security measure, which is what at issue - is at issue here, even than a 41-year-old, someone else in the protected class. And so when an employer acts, as General Dynamics did here, with the union, to come up with a solution that protected them from a harsh outcome and protected their reliance interests, it's simply not anything remotely within the contemplation of Congress when it - when it - in the prohibitory - prohibitory sections of the ADEA. If the Court -

QUESTION: Do we know the numbers, Mr. Verrilli? We have, I think, some 200 people in the class that's suing the 40 to 49-year-old. How many were grandfathered in the 50 -

MR. VERRILLI: I - I believe it's - I believe it's a comparable number, but I have to confess, Your Honor, I don't know for sure what the exact number is. If the Court has no further questions, I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Verrilli.

Mr. Biggerman, we'll hear from you.

ORAL ARGUMENT OF MARK W. BIGGERMAN

ON BEHALF OF RESPONDENTS

MR. BIGGERMAN: Mr. Chief Justice, and may it please the Court:

The real issue here is whether this Court should add an additional element to the ADEA's prohibition language. And the answer, we submit, is no. The ADEA prohibits discrimination against individuals 40 years old or older because of their age, not because of their older age. Petitioner would have this Court change that language to require that individuals 40 and older also be relatively older than any other group of employees with whom they -

QUESTION: Mr. Biggerman, how do you deal with the relaxed physical tests for, say, 50 or over? As Mr. Verrilli mentioned, the flex-time, the reduced hours for people who are well over 40 - 55, say, so that the - could - could the 40 to 55 age group then sue because they have

to meet in full the physical fitness requirements, they can't have the flex-time, they can't have the reduced hours?

MR. BIGGERMAN: Your Honor, those are encompassed in affirmative defenses. What we are asserting here is simply whether the respondents have a cause of action.

QUESTION: So is your answer yes, that would be discrimination? It might be a defense but it would be prohibited discrimination under this Act to make those special accommodations to older workers?

MR. BIGGERMAN: That would be prohibited subject to an affirmative defense.

QUESTION: What would the affirmative defense be?

MR. BIGGERMAN: For example, a bona fide occupational qualification.

QUESTION: Why in the world would that be a BFOQ? You don't have to be over 55 to do the job, quite the contrary. Special accommodations are being made so that they're able to do the job. It doesn't fit with any BFOQ decision that I know. It's a very extraordinary applicational definition of BFOQ, bona fide occupation qualification essential to the job.

QUESTION: So what happens is that a piece of legislation that everybody thought was meant to aid older workers, especially those towards the end of their working

careers, ends up harming them. You - you - you cannot make special arrangements to let them do flex-time. You can't make these accommodations - a very strange consequence of this legislation.

MR. BIGGERMAN: Your Honor, we - we - we submit that Congress set forth specific examples as to when there are exceptions that can be made.

QUESTION: But do you have - the exceptions are in the statute. You gave me the BFOQ, I think it's quite clear that that wouldn't work in this case. What else would be? We have, as you said, this would be discrimination. How could the employer then defend against it? What is there in the statute that would give the employer an affirmative defense?

MR. BIGGERMAN: Your Honor, what would give the employer an affirmative defense to have, as you said, a more - to permit - if you could repeat the example?

QUESTION: To make special accommodations to older workers, no physical fitness test, shorter hours, flex-time, and that's not available to people who are under 55, say.

MR. BIGGERMAN: Well, I - I think that - let me expand a little on my answer. I think that Congress' goal here was to make age a neutral factor in employment. Now, I don't think that Congress intended to permit any special

considerations for age unless they're set forth in the statute.

QUESTION: But what about all the sections in ERISA and in the Internal Revenue Code that allow various provisions for benefit plans, for retirement, and for stock option exercise and so forth that are going to be at odds with your interpretation.

MR. BIGGERMAN: Your Honor -

QUESTION: I mean, there are a whole array of laws that will be directly affected if the Sixth Circuit view is affirmed. Now, what do we do about all that? Do you think Congress really intended such a result?

MR. BIGGERMAN: I don't think that the ADEA conflicts with those provisions because a cause of action, unlike in this case, 12(b)(6), this case should not have been dismissed, it should have been allowed to go forward. And in the employer - in any situation which those regulations or those statutory provisions under some other law - IRS -

QUESTION: One thing - I see that point - that one thing that everybody, I think, is saying in one form or another, is one thing that isn't covered in 2 is hiring and firing people. So every time an employer dismisses a person over the age of 40, he will either be hit with a lawsuit by the older one, or if he tries to lean over a

little backwards in favor of the older - and I don't want to be too prejudiced in favor of the older though I am in that category - the - the point is that every time he then tries to be at all sympathetic to the older person, the younger one hits him with a lawsuit.

And so what the Federal courts become is an employment court to discover in each instance whether there was cause, and moreover, no employer could possibly lean over even a little bit favorable towards an older person, and that's why I think what we're saying is your - I would say it - your interpretation will blow up this Act, destroy it. An Act that was intended to help older people will now suddenly become an Act which turns Federal courts into labor courts, deciding in each case that anything happens to a person over the age of 40, whether the employer was or was not justified. Now - now that is - I'm putting it strongly, but I want to hear what I think they're telling you on the other side, which is what I thought I was articulating.

MR. BIGGERMAN: Your Honor, I would - I would analogize that to this Court's decision in McDonald v. Santa Fe, when, prior to that in McDonnell Douglas, this Court said - set forth the first prima facie requirement as requiring a minority under Title VI. Yet in McDonald v. Santa Fe it said no because of sex. That is when you

can sue like in the Age Act.

QUESTION: Well, that - that brings me back to the answer you gave to Justice Ginsburg s question and it was again reflected in Justice Breyer's. Am I correct from inferring from your answer - I don't think you said it quite this way - that in Justice Ginsburg's hypothetical regarding flex-time and - and no physical fitness test, you would say that there is a violation there? That's what I carry away from your - from your answer to her, and that directly relates to Justice Breyer's concern that he just expressed.

MR. BIGGERMAN: Your Honor, I must - I must humbly confess that I don't have a grasp of the entire statute in every situation in every regulation. I wish at this moment I did. But I would give you the general answer, that Congress intended to make age neutral, and if there were no exception, no exemption in the statute or no regulation that provided an affirmative defense, then that would be impermissible if it was based on age.

QUESTION: Now, I - I have to tell you that - that as currently advised, that seems to me so fanciful a version of what Congress intended that I would not interpret the statute that way. Now, I will go along with you if you can tell me that, with respect to this ambiguous statute, I am bound by Chevron or Mead to - to

accord deference to the agency's interpretation. Your - your - the people on the other side say that there's no such requirement. Do you think there is a requirement here?

MR. BIGGERMAN: Your Honor, I definitely think that deference is -

QUESTION: What are you relying on? The agency guideline?

MR. BIGGERMAN: 1625.2 of the interpretive guideline. Is that what you're referring to?

QUESTION: Yes.

MR. BIGGERMAN: Yes, which was also supported by the agency adjudication in the 1997 adjudication, which was confirmed by the entire commission, which is the only -

QUESTION: Do - do you agree with the description of the other side that that was not promulgated by notice and comment rule-making?

MR. BIGGERMAN: It was my understanding that the EEOC promulgated it by notice and comment.

QUESTION: Yes, but they said that they did it simply to go along with the Carter administration's request or requirement that even interpretive rules be promulgated by notice and comment rule-making even though the ADA does not require that. Now, that's what they

actually wrote in their brief, and is that accurate?

MR. BIGGERMAN: It's - it's my understanding that that is accurate.

QUESTION: All right. If that is accurate, why would Congress have intended, and the relevant pages of Mead use the word Congress in one paragraph five times to try to figure out what Congress wanted in this respect, why would Congress have wanted the courts to defer to this kind of interpretive regulation, which if it's taken seriously would destroy Congress' own ends? That's a pretty tough question.

MR. BIGGERMAN: It is.

QUESTION: I'm putting it - I'm overstating these slightly because I want to elicit clear answers from you.

MR. BIGGERMAN: I - I - it's not my belief that this goes against Congress' intentions. I think the Congress set out to set forth specific exemptions, including the Older Workers Benefit Protection Act, in which there are instances when older workers can be favored, and so therefore I don't think it went against Congress' intention. I mean, the Older Workers Benefit Protection Act set forth a whole bunch of additional exemptions after this regulation was already in place.

QUESTION: Mr. Biggerman, may I ask you two questions? The first question is, when was the statute

enacted?

MR. BIGGERMAN: The ADEA?

QUESTION: Yes. I think the sponsor of the statute, the Secretary of Labor, was a former law professor of mine, so I think it goes back quite a ways.

(Laughter.)

MR. BIGGERMAN: Your Honor, I - I think you're right.

QUESTION: Well, it's a good many years ago, wasn't it?

MR. BIGGERMAN: It was a good many years ago.

QUESTION: And the second question is, what - what is your comment on this sentence in the district court's opinion: Every Federal court to address the issue has held that a claim of reverse age discrimination is not cognizable under ADA. This suggests that there's a long history of viewing the statute in one - one way and that perhaps there are substantial reliance interests out there that would build up over a period of many, many years. Would you comment on that aspect of the case?

MR. BIGGERMAN: I - that statement by the district court was incorrect. The decision in the Mississippi Light - Mississippi Power and Light decision had been rendered before the district court's decision and that was at least one decision that -

QUESTION: When was that case decided? Just shortly before the district court's decision?

MR. BIGGERMAN: No, Your Honor, it was a little bit before that and I'm looking for the cite.

QUESTION: Well, isn't it true though, as a general matter, the courts had generally read the statute the way the district court read it?

MR. BIGGERMAN: As - as a - see, Your Honor, Hamilton came out and then all of the district courts followed the Seventh Circuit's decision in Hamilton without really interpreting the ADEA. They just simply followed that. So, yes, there is a body. The majority of the body did go in that direction, but simply relied on the Hamilton -

QUESTION: But do you think that the - the business community has - was justified in relying on that rule for a good many years?

MR. BIGGERMAN: I don't think so, Your Honor. I think in light of the EEOC -

QUESTION: You think the statute's so clear?

MR. BIGGERMAN: The statute and the EEOC -

QUESTION: The EEOC during all this period continued to say that - that it worked both ways, didn't it?

MR. BIGGERMAN: Not in its only binding opinion.

In its only binding opinion it followed the language of 1625. The letters, the opinion letters by the Secretary - the Department of Labor - and the EEOC before, those aren't binding. The binding -

QUESTION: Well, the question isn't whether they're binding. The question is whether the business community could rely on them. I mean, here are your - your - you have this guideline out there, this regulation, I would say, and incidentally I don't know why you accept the proposition that interpretive regulations are somehow different from substantive regulations insofar as their authoritativeness is concerned, but you have the regulation out there, but you have the agency saying to the business community in an opinion letter, don't worry about it, we're not going to enforce it that way, and indeed we're going to amend the regulation. Now, you know, what - what - what am I to make about that as far as Chevron deference is concerned?

MR. BIGGERMAN: Your Honor, I would - I would ask that you look at the top at the commission and what they did in the binding opinion, and I think that is what is entitled to Chevron deference.

QUESTION: But the - the regulation itself seems to have some internal tension, if not inconsistency, because what you're relying on is what it says in

1625.2(a) and then (b) goes on to say, but the extension of additional benefits, such as increased severance pay to older employees within the protected group, may be lawful when the employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. That seems to be just a recognition that the older you get, the more problems you have, and so if you can - if this - this regulation says, yes, you can give benefits.

MR. BIGGERMAN: Your Honor, again I would come back to the - the statement that in order to fulfill the requirements set forward in (b), reasonable basis, you need facts. That's an affirmative defense, which we don't have. That goes above and beyond a simple cause of action. The employer could use that as an affirmative defense to defend its action.

QUESTION: Not unless there's a law allowing it. I don't see one. I mean, there is no provision unless you shoehorn it under this (B)(i) section, that allows any out for the employer, is there?

MR. BIGGERMAN: I - I don't understand.

QUESTION: For the employ - well, I'm taking up your time. You have only a few minutes left. I just don't see a provision allowing the affirmative defense.

MR. BIGGERMAN: Am I to understand you, Justice

O'Connor, that you don't see a provision in the statute that allows the same affirmative defense as in this regulation? That's correct. This - this is outside, but again, it's the EEOC interpreting the Act. As we all know, a statute doesn't cover every instance. Does that answer your question or would you like me to go -

QUESTION: Go ahead.

MR. BIGGERMAN: Okay. I - I would just like to say that the Age Discrimination Act, the prohibition language says, because of age, and this Court has before, in Consolidated Coin, ruled that the fact that one individual loses out to another individual within the protected class, it doesn't matter. It's because - it's whether the individual loses out because of age. That - that's the critical thing here. The -

QUESTION: The example that's given in the paper is the - the 51-year-old and a 42-year-old are both applying for a job and no matter which one gets it you can't discriminate on account of age. How could a decision to employ the 51-year-old be a discrimination on account of age? What - what would be in the employer's mind if it's an age-based decision?

MR. BIGGERMAN: Your Honor, are you asking me for an example as to why someone might want to hire -

QUESTION: How - how could that - how could that,

within the meaning of the statute, be a discrimination on account of age if they hired the older person?

MR. BIGGERMAN: Congress found that at age 40 and over any discrimination on the basis of age injures the individual.

QUESTION: But the decision to hire the older person, how could that be a - would it have to be just the unique situation where the employer doesn't like 42-year-olds?

MR. BIGGERMAN: Well, it - there may be - the employer may want a situation where they want the prestige of having someone with gray hair as opposed to less gray hair for a consultant position or for a television anchorman.

QUESTION: Well, that wouldn't be discrimination on the basis of age. You just like gray-haired people. Some young people have gray hair.

QUESTION: They'd be just in favor of gray-haired people, yeah.

(Laughter.)

MR. BIGGERMAN: But - but if - if they had a requirement in their policy that it had to be only 51 or older -

QUESTION: Well, it's -

MR. BIGGERMAN: Right.

QUESTION: You could be 51 and still have dark hair. Some of us -

(Laughter.)

QUESTION: Maybe they're moved by humanity, or is that an unfortunate thing to take into account in the law?

MR. BIGGERMAN: It - it is not, Your Honor.

QUESTION: So maybe they want to keep this older person around because it's the decent thing to do -

MR. BIGGERMAN: But the statute -

QUESTION: - and then the younger person comes in and sues.

MR. BIGGERMAN: The statute prohibits discrimination on the basis of age. It just simply sets the protected class at 40 and over. That's our argument. If there are no further questions.

QUESTION: Thank you, Mr. Biggerman.

Mr. Clement, we'll hear from you.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENTS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

Absent an affirmative defense, the Age Discrimination in Employment Act prohibits discrimination on the basis of age against members of the protected class

and is not limited to claims brought by the older members of the class.

QUESTION: Mr. Clement, now, Justice Ginsburg gave some examples of employment practices that favor older persons, for which I don't think there's an affirmative defense. Am I correct that there isn't?

MR. CLEMENT: There's no affirmative defense in the statute, Justice Stevens, and let me address those hypotheticals, because I think these seemingly benevolent instances of using age may be beguiling, but I think in reality even those benevolent uses of age implicate the interests and concerns of the Age Act. Take, for example, an employer who's willing to exempt employees over 50 from a physical fitness test. Well, the first question I would ask is, if you're willing to exempt workers over 50 from the physical fitness test, is the physical fitness test really a legitimate occupational qualification? And should that be used to exclude workers between 40 and 50 from the workplace?

QUESTION: Let's take the hours because you certainly couldn't use that claim that that - that maybe you didn't need this test. The claim isn't that it necessarily screens out the older workers, but the employer doesn't want to put them through the strain of the test. But let's - let's move to the flexible hours,

reduced work hours, we're not going to give those benefits to younger people within the protected class, only 50 and over.

MR. CLEMENT: Justice Ginsburg, it seems to me that stereotypes that older workers are going to be more strained and can't work as hard and need time off are precisely the stereotypes the Act is designed to prohibit. Now, it's different if a worker -

QUESTION: Well then, how - how in the world could the agency then adopt 1625.2(b) that allows increased benefits to older workers if the employer can show that those older people have more problems?

MR. CLEMENT: Justice Ginsburg, 1625.2(b) is limited to benefits, and Charles Shaner, who's the general counsel of the EEOC at the time that the Older Worker Benefit Protection Act was passed, explained that the statutory affirmative defense that would be implicated here on remand, 623(f)(2)(B)(i), is a simplification of that regulatory defense. And I think what the Act as a general matter does is it recognizes that benefits are more difficult because it's tied up with issues of retirement age and the like, and so a more flexible approach is necessary with respect to benefits.

But with respect to core employment, hiring, firing, promotion, and compensation, the Act reflects a

judgement, as stated in the purpose, that they want to promote the employment of older people on the basis -

QUESTION: Now, Mr. Clement, just - I want to be sure I have an answer to my question. With respect to employment practices, such as that described, am I correct in - in agreeing that if an employer uses a stereotype to - to reach that conclusion, there would be no affirmative defense for it?

MR. CLEMENT: I - I think that's right. Unless this Court were, I mean, if this Court has a - has a very flexible view of age in the prohibition, I suppose it could allow the agency to adopt a flexible affirmative defense along the lines of Weber. Let me also -

QUESTION: Why not?

MR. CLEMENT: Let me also say that the statute specifically gives the EEOC, in 29 U.S.C. 628, the regulatory authority to make exemptions, and I think if there are specific concerns with particular practices that seem benevolent and are benevolent, then the EEOC can make a regulatory exemption. But with respect to these seemingly benevolent -

QUESTION: Where - where is that authority?

MR. CLEMENT: 29 U.S.C. 628. It's in the statutory appendix, I believe at page 4a, and that - and that is - that is a sweeping authority. It gives the EEOC

both the authority to make interpretive regulations and substantive exemptions from the statute.

QUESTION: Well - well if - if your submission is that stereotypes are - are deplored and prohibited by the Act, how could the EEOC make an exemption to the contrary?

MR. CLEMENT: Well, I think, as I said, if - I think that - that the Act is perfectly consistent with the idea that these stereotypes should play no role. The purpose clause of the statute says it wants to promote the employment of older workers, but how does it say it wants to promote the employment of older workers? By having them judged on their ability rather than age. And I think it reflects a judgement that an employer that has age in mind and not ability when trying to favor an older worker is not going to be able to reverse the process when they're working to the detriment of a worker.

QUESTION: So then in any instance in which the employer quite honestly is moved by some human feeling that is related to an older person, that the Act would rule out?

MR. CLEMENT: I - I think that's right, Justice Breyer, but what's -

QUESTION: All right. Now, is there any reason to think that that's what Congress had in mind, any reason to think that it - that it - that it really wanted in this

respect, because most human beings are moved by these kinds of emotions, they wanted to prohibit that?

MR. CLEMENT: Two responses, Justice Breyer. First -

QUESTION: Helps other people.

MR. CLEMENT: First, I think that the natural human instinct to favor an older worker would be to cut a break to a worker who's been with the company many years, and if that's what an employer wants to do, it's perfectly free under the Age Act to say, if you've been with us 30 years or 20 years, we're going to cut you a break. To the extent that's not the motivation, but it's purely age-based, then there is an indication in the statutory history, and that indication is the colloquy between Senators -

QUESTION: I thought that was ambiguous, somewhat ambiguous.

MR. CLEMENT: Well, the colloquy is not at all ambiguous.

QUESTION: Who - who heard that colloquy? I mean, were they the only two people on the floor? I'm really supposed to get -

(Laughter.)

MR. CLEMENT: Justice Scalia, all I can tell you is that -

QUESTION: We don't really know, do we?

MR. CLEMENT: Justice Scalia, I can tell you this. The same number of people heard that colloquy as heard the colloquy that this Court relied on between the same two Senators in interpreting the Age Act in Betts and in United Airlines against McMann. On two occasions this Court has recognized that those two Senators have important views on the Age Act because they were the principal sponsors and the floor managers of the bill, and as the icing on the cake, the Court relied on Senator Javits again in the Criswell case. But -

QUESTION: How - how much use has the EEOC made of Section 628 when it can issue exemptions or that sort of thing?

MR. CLEMENT: Mr. Chief Justice, I don't know the exact number of times, but I know there is a pending exemption right now that's been - that's been promulgated -

QUESTION: Are there - are there - are there other exemptions that have actually been granted?

MR. CLEMENT: There - there are, Mr. Chief Justice, and the one that they're working on now is to give employers greater flexibility to coordinate their retirement benefits with Medicare benefits in response to a Third Circuit decision in the Erie County case -

QUESTION: Well, may I ask -

MR. CLEMENT: - so that's not just statutory authority that's never been used.

QUESTION: May I ask you a similar question? To what extent has - how many enforcement proceedings has the EEOC commenced to - to enforce the reverse discrimination aspect of this statute?

MR. CLEMENT: Justice Stevens, there's one time where they did enforce it and that was a full committee proceeding. The decision was circulated to the full commission, so that is a binding decision on the commission.

QUESTION: So they did - there is one example of an enforcement action?

MR. CLEMENT: Right.

QUESTION: In all these years, only one?

MR. CLEMENT: Well, but there are only a handful of examples that go the other way and with - I think it's important to understand that with respect to the entire universe of EEOC decisions, as opposed to Department of Labor decisions, there's this one decision that comes up in a non-benefits context where they apply the regulation. There are three other decisions that come up in a benefits context -

QUESTION: In that - in that very context, Mr.

Clement, you didn't mention this Court's decision in O'Connor against Consolidated Coin, where was it the 52-year-old had a claim for relief when the 41-year-old was preferred. If I understand your argument, you - you are saying that equally the 41-year-old would have - have a claim if the 52-year-old were preferred?

MR. CLEMENT: That's correct, Justice Ginsburg. That's exactly what the Senate colloquy said that - and that colloquy was picked up in the regulation, which is a binding regulation with notice and comment rule-making.

QUESTION: It says in the colloquy -

QUESTION: Well, leave - leave - no, please go ahead.

QUESTION: It says in the colloquy, could not turn down either.

MR. CLEMENT: Right. There would be -

QUESTION: It doesn't - they were clear, turn down either -

MR. CLEMENT: Right.

QUESTION: - and choose the other. It could be - can't -

MR. CLEMENT: No. It said there would be discrimination whichever way the decision went, and I don't think that's all that unusual. I mean, anytime in the Title VII context that you have an employee who's

fired for sex or race -

QUESTION: Whichever way it went, if it was -

MR. CLEMENT: - somebody will sue.

QUESTION: - whichever way it went, if it was based on age, I still don't understand how one could hire the 51 because he discriminates against 42-year-olds.

MR. CLEMENT: I - I think, Justice Stevens, you could have a presumption or a stereotype that older workers are going to be better. I suppose it's also true that you could have a situation where, for some other benefits reason, an older worker wasn't going to have as many benefits or would get paid less -

QUESTION: But the problem with your stereotype argument that the Government's trying to drive out of people's minds age, just the way it's trying to drive out of people's minds race, sex, and the other things against which you can't discriminate, is that the Government doesn't try to drive it out of their minds, it only - only over 40. Under 40 it's perfectly okay to have these - these - these thoughts of age. You just simply cannot regard this statute as a statute that is directed against some moral disapproval of - of taking age into account.

MR. CLEMENT: Justice Scalia, the statute, when it was originally enacted, had the protected class only between 40 and 65, so I don't think the fact it's - now

only has a lower bound tells you anything in particular about the prohibition.

QUESTION: Mr. -

MR. CLEMENT: And I thought you said it well for the Court in the Consolidated Coin case that this is not a statute about protecting individuals against the burden of being over 40 or to protect against over-40ism. It protects people in the protected class, which is crystal-clearly defined to be individuals over 40, from discrimination because of age. The Act doesn't care if the worker in the protected class who loses out is the younger of the two. The Act is triggered whenever an individual in the protected class loses out because of his or her age. Thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Clement.

Mr. Verrilli, you have 4 minutes remaining.

MR. VERRILLI: Thank you, Mr. Chief Justice. We're prepared to submit our case.

CHIEF JUSTICE REHNQUIST: Very well. The Court - the case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)